

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

EAGLEMED, LLC)	
Healthcare Provider)	
)	
V.)	
)	
TRAVELERS INSURANCE)	
Insurance Carrier)	Docket Nos. 8,500,703
)	8,500,704
)	8,500,705
ARISING FROM THE WORKERS)	& 8,500,706
COMPENSATION CLAIMS OF:)	
Carlos J. Rios CL # 478CBEUD9648F)	
Cody D. Crook CL # 478CBEUD9083J)	
William R. Leikam CL # 478CBEUD5626H)	
Wayne Tommer CL # 478CBF9X9496R)	

ORDER

STATEMENT OF THE CASE

All parties requested review of the October 13, 2015, Order Regarding Subject-Matter Jurisdiction entered by Hearing Officer Douglas A. Hager. The Board heard oral argument on March 15, 2016. J. Phillip Gragson of Topeka, Kansas, appeared for the healthcare provider (EagleMed). William L. Townsley, III, of Wichita, Kansas, appeared for the insurance carrier (Travelers).

The Board has jurisdiction to hear appeals relating to medical fee disputes made pursuant to K.S.A. 2012 Supp. 44-510j(d)(2), which states, in part:

Any decision rendered under this section may be reviewed by the workers compensation appeals board. A party must file a notice of appeal within 10 days of the issuance of any decision under this section. The record on appeal shall be limited only to the evidence presented to the hearing officer. The decision of the director shall be affirmed unless the board determines that the decision was not supported by substantial competent evidence.

In order to best understand the issues, we will first define some of the terminology in this case, including the Kansas Workers Compensation Schedule of Medical Fees (Fee

Schedule), the Airline Deregulation Act¹ (ADA), and the McCarran-Ferguson Act² (MFA). The relevant portion of the Fee Schedule states:

GENERAL: Reimbursement for ambulance services (ground only) will be limited to the emergency medical service's billed charge, less 10%. Air ambulance services will be limited to usual and customary charges as per 49 U.S.C., Section 41713(b) of the Federal Aviation Act.³

49 U.S.C. § 41713(b) of the ADA states, in part:

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

. . .

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

The ADA, as its title suggests, is meant to deregulate domestic air transport.⁴ The ADA promotes “maximum reliance on competitive market forces” to promote “efficiency, innovation, and low prices . . .” and precludes states from interfering with federal deregulation of air carriers by enacting and enforcing their own economic regulations “relating to rates, routes, or services” of any air carrier.⁵ *Morales* states the ADA is to be construed broadly in a “sweeping nature.”⁶ A state law will not be preempted under the

¹ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C.A. § 1305 *et. seq.*, subsequently recodified at 49 U.S.C.A. § 41713 *et seq.*).

² 15 U.S.C. § 1012.

³ Workers Compensation Schedule of Medical Fees , AMBULANCE AND AIRCRAFT SERVICES GROUND RULES AND FEES section, p. 167, effective January 1, 2012.

⁴ See *Am. Airlines v. Wolens*, 513 U.S. 219, 222 (1995).

⁵ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79, 112 S. Ct. 2031, 2033, 119 L. Ed. 2d 157 (1992). See also *Dan's City Used Cars, Inc. v. Pelkey*, ___ U.S. ___, 133 S. Ct. 1769, 1775, 185 L. Ed. 2d 909 (2013); *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 371, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 230, 115 S. Ct. 817, 824, 130 L. Ed. 2d 715 (1995); *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1343 (11th Cir.2005); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir.1995) (*en banc*).

⁶ *Morales*, 504 U.S. at 384-85. See also *State ex rel. Kline v. Transmasters Towing*, 38 Kan. App. 2d 537, 542-43, 168 P.3d 60 (2007) (The phrase “relating to” is interpreted broadly.).

ADA where a state only tenuously, remotely or peripherally affects prices, routes and services.⁷ *Morales* indicates the free market is left to determine the price.

In *Northwest, Inc. v. Ginsberg*, the United States Supreme Court wrote:

In 1978, however, Congress enacted the ADA, which sought to promote “efficiency, innovation, and low prices” in the airline industry through “maximum reliance on competitive market forces and on actual and potential competition.” 49 U.S.C. §§ 40101(a)(6), (12)(A). While the ADA did not repeal the predecessor law’s saving provision, it included a pre-emption provision in order to “ensure that the States would not undo federal deregulation with regulation of their own.” *Morales supra*, at 378, 112 S.Ct. 2031. In its current form, this provision states that “a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.” § 41713(b)(1).⁸

15 U.S.C.A. § 1012, the MFA, states:

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The Hearing Officer found the Kansas Division of Workers Compensation (Division) has subject-matter jurisdiction to determine the proper amount of the charges disputed by the parties. The Hearing Officer determined that because the Kansas Workers Compensation Act (Act) was enacted for the purpose of regulating the business of workers compensation insurance, the MFA precluded ADA preemption of the Fee Schedule.

⁷ *Morales*, 504 U.S. at 390.

⁸ *Northwest, Inc. v. Ginsberg*, ___ U.S. ___, 134 S. Ct. 1422, 1428, 188 L. Ed. 2d 538 (2014).

The Board has considered the record and adopted the stipulations listed in the Order. At oral argument, the parties stipulated the issue of what EagleMed may charge or what Travelers is responsible to pay is currently not before the Board and was not decided by the Hearing Officer.

ISSUES

Both parties agree the ADA preempts the application of the Fee Schedule to air ambulance services. Both parties agree the Hearing Officer erred in considering the entirety of the Act as opposed to solely the Fee Schedule when determining whether the MFA applies. They argue the MFA does not apply because the Fee Schedule does not regulate insurance, nor is the Act's purpose the regulation of the business of insurance. Both parties agree the Hearing Officer incorrectly relied upon a Texas administrative decision⁹ to conclude the Division may set a price or a reduction for the cost of air ambulance services because the decision is currently on appeal and conflicts with Texas law.

Travelers argues the ADA preemption effectively binds EagleMed by the federal Medicare schedule for reimbursement of its services. Travelers contends the Hearing Officer's Order should be reversed and remanded with instructions to resolve the pricing dispute in a manner consistent with federal law. Travelers notes the Hearing Officer has not entered a decision related to the amount of reimbursement due, precluding the Board from addressing this issue.

EagleMed argues it is entitled to 100 percent of its billed charges. Moreover, EagleMed argues the Board has authority to order Travelers to pay the full amount of billed charges, though EagleMed will accept, as a compromise, 90 percent of said charges without waiver of its position regarding ADA preemption. Alternatively, EagleMed maintains the issue of reimbursement should be remanded to the Hearing Officer.

The issue for the Board's review is:

Does the ADA preempt the Division from establishing rates of payment for air ambulance services or does the MFA reverse-preempt the ADA, thereby exempting the Fee Schedule from federal preemption?

FINDINGS OF FACT

EagleMed is an accredited critical care transport service operating a fleet of medically equipped rotor-wing and fixed-wing aircraft. In 2013, EagleMed provided air

⁹ *In re: Reimbursement of Air Ambulance Services Provided by PHI Air Medical*, Texas State Office of Administrative Hearings, No. 454-15-0681.M4, *et. al.* (Sept. 8, 2015).

transport services in four workers compensation cases as listed above, and subsequently submitted bills to Travelers for its services related to each claimant: \$21,597.27 related to Carlos Rios; \$28,826.80 related to William Leikam; \$33,042.95 related to Cody Crook; and \$32,940.70 related to Wayne Tommer.

Travelers provided payment to EagleMed in amounts which would be payable under the national Medicare fee schedule: \$4,704.07 related to Carlos Rios; \$5,827.27 related to William Leikam; \$8,010.67 related to Cody Crook; and \$9,910.71 related to Wayne Tommer.

EagleMed initiated a fee dispute proceeding with the Division on March 21, 2014. EagleMed indicated that air ambulance services are not subject to the Fee Schedule due to the ADA and requested it be reimbursed 100 percent of its billed charges. Travelers agreed the ADA preempts the Fee Schedule. However, Travelers argued the preemption limits EagleMed's reimbursement to that of the national fee schedule, which it contends is set by Medicare.

EagleMed then requested a formal hearing pursuant to K.S.A. 44-510j. Thereafter, the parties agreed with the Hearing Officer to bifurcate the proceedings to first resolve the preemption issue. The Hearing Officer requested the parties submit briefs setting forth their positions, including the issue of how the MFA might affect the question of preemption. Both parties argued the MFA reverse-preemption did not apply in this case.

In his Order of October 13, 2015, the Hearing Officer concluded the MFA did apply. He explained:

The parties' focus seems centered more on the question whether the medical fee schedule provisions of the [Act] were enacted for the purpose of regulating the business of insurance, as opposed to a broader view of whether the [Act] was so enacted. See EagleMed's Supplemental Brief, p.1 ("The schedule of medical fees for air ambulance services in the [Act] does not regulate the 'business of insurance'"); Supplemental Brief of Insurance Carrier, p.3 ("the reason that [MFA] does not apply here is that the Kansas workers compensation fee schedule was not 'enacted . . . for the purpose of regulating the business of insurance' as required for reverse preemption to exist under the [Act].") The hearing officer declines the parties' invitation to adopt such a constrictive view of the issue, finding it more appropriately addressed in the more expansive formulation, because the medical fee setting and dispute resolution provisions are an integral part of a broad and comprehensive administrative mechanism for regulating and taxing the business of workers compensation insurance in Kansas. This determination is wholly consistent with the Congressional intent behind adoption of the [MFA], to preserve to the states the regulation and taxation of insurance unless federal law specifically relates to the business of insurance. A similar determination was reached on very similar facts under a comparable state workers compensation law in a recent Texas administrative proceeding that also reached the conclusion that the ADA does not

preempt application of that state's medical fee schedule and dispute resolution process from determination of the proper reimbursement for medical air ambulance services provided to injured workers. See Decision and Order, In re: Reimbursement of Air Ambulance Services Provided by PHI Air Medical, Texas State Office of Administrative Hearings, Docket No. 454-15-0681.M4, *et. al.*, September 8, 2015, fn. 3, p.4.¹⁰

Both parties appealed to the Board on October 27, 2015.

ANALYSIS

Does the ADA preempt the Division from establishing rates of payment for air ambulance services or does the MFA reverse-preempt the ADA, thereby exempting the Fee Schedule from federal preemption?

For the reasons set forth in the parties' briefs, the Board reverses the Hearing Officer's ruling that the MFA reverse-preempts the ADA and that the Fee Schedule preempts the ADA based on the MFA.

From the initiation of this dispute, the parties' arguments and the Hearing Officer's Order assumed the Fee Schedule allowed a 10 percent reduction in charges.¹¹ However, at oral argument before the Board, EagleMed noted the 2012 version of the Fee Schedule controlled. The Board agrees. The 2012 Fee Schedule contains no such 10 percent reduction and only limits air ambulance services to their usual and customary charges as per the ADA. The ADA contains no guidance on what constitutes the usual and customary charges for air ambulance services.

The Board need not decide whether the Fee Schedule or the ADA sets pricing for air ambulance services for Kansas workers compensation claims. Elevating either the Fee Schedule or the ADA over the other leads to the same result. The 2012 Fee Schedule does not set a price for airline ambulance charges, other than directing us to the ADA. In turn, the ADA sets no pricing for air ambulance services. If the Board determined that the ADA preempts the Fee Schedule, we are left in the same predicament as if the Fee

¹⁰ Hearing Officer Order (Oct. 13, 2015) at 12, fn. 6.

¹¹ See Travelers' Oct. 30, 2014 letter to Jose L. Castillo (incorporating Apr. 10, 2014 argument from Mark M. Levine, Senior Counsel, that the Fee Schedule set a 10% reduction); EagleMed's Oct. 30, 2014 letter to Mr. Castillo (noting 10% reduction under the Fee Schedule); EagleMed's Prehearing Questionnaire (filed Mar. 4, 2015) at 2; EagleMed, LLC's Memorandum in Support of Full Payment for its Billed Charges or Payment in Accordance with the Kansas Workers' Compensation Fee Schedule (dated May 1, 2015) at 2, 10-11; Brief of Insurance Carrier (dated May 1, 2015) at 5; EagleMed, LLC's Response to Brief of Insurance Carrier (dated May 22, 2015) at 1, 10; Order of the Hearing Officer Regarding Subject-Matter Jurisdiction (Oct. 13, 2015) at 13-14 (fn. 7 "fee schedule . . . has determined that a reimbursement . . . at 90% of billed charges is . . . appropriate . . ."); Brief of Insurance Carrier (filed Dec. 18, 2015) at 4; Brief of Appellee/Cross-Appellant EagleMed, LLC (filed Jan. 6, 2016) at 4-5, 9 (fn. 5)

Schedule controlled the pricing for air ambulance service. The reasoning is circular – again, both our Fee Schedule and the ADA lead us to the same result – pricing is based on the ADA. As such, the issue of whether the ADA preempts the Division from establishing rates of payment for air ambulance services is moot.

The issue would not be moot for Fee Schedules from other years that actually impact air ambulance pricing. However, that issue is not before us. Any argument regarding what EagleMed may charge for air ambulance services is not ripe. Such issue has not been decided by the Hearing Officer.

CONCLUSION

The Hearing Officer's Order is reversed. The Board agrees with the parties that the Fee Schedule is preempted by the ADA, and the MFA does not reverse-preempt the ADA in this instance.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Hearing Officer Douglas A. Hager dated October 13, 2015, is reversed and remanded for a determination of whether the charges made by EagleMed are usual and customary under the ADA.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

EAGLEMED, LLC

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**DOCKET NOS. 8,500,703; 8,500,704
8,500,705; 8,500,706**

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